



# *Homeland Security:*

*The Challenge of Finding Jail Space*

**I**n an address to the nation a month after the tragic events of September 11, 2001, President George W. Bush declared, "The American people are beginning to understand that we fight a two-front war against terror. We fight in Afghanistan...and we fight it at home here, to make sure America is as safe as possible." President Bush went on to explain that "we welcome legal immigrants and we welcome people coming to America. We welcome the process that encourages people to come to our country to visit, to study, and to work. What we don't welcome are people who come to hurt the American people."

**JOSEPH SUMMERILL**

To wage the war against terror here in America, the President proposed on June 6, 2002, the creation of a permanent, cabinet-level Department of Homeland Security (DHS) to unite essential agencies that must work more closely together: among them, the Coast Guard, the Border Patrol, the Customs Service, the Transportation Security Administration, the Federal Emergency Management Agency, and the Immigration and Naturalization Service. Employees of this new agency will come to work every morning knowing their most important job is to protect their fellow citizens.<sup>2</sup>

Following the President's lead, the United States House of Representatives passed on July 26, 2002, the Homeland Security Act of 2002, H.R. 5005, creating the DHS, whose primary mission is to prevent terrorist attacks within the United States and reduce the vulnerability of the United States to terrorism. Within that Act, the House transferred detention and removal functions currently performed by the Commissioner of the Immigration and Naturalization Service (INS) to the new DHS.<sup>3</sup>

Similar legislation is now being considered in the United States Senate. Like the version of the bill passed by the House, the Senate's bill (the National Homeland Security and Combating Terrorism Act of 2002) transfers to the DHS functions from other existing agencies, including the law enforcement components of the INS relating to detention and removal.<sup>4</sup> While at the time this article was submitted for publication the Senate was still debating a provision of the bill related to civil service protections, the transfer of INS detention functions was not at issue. Accordingly, law enforcement officials can assume that responsibility for detaining illegal immigrants will soon be transferred out of the INS and into the new DHS.

### **An Increase in the Number of Detainees**

While detention responsibilities have long been a core function of the INS,<sup>5</sup> it was not until the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that the INS was required to detain aliens as a means for ensuring an alien's participation in removal proceedings and compliance with removal orders.<sup>6</sup> In addition, IIRIRA eliminated any discretion on the part of INS in deciding whether to release certain aliens from detention, subjecting practically all noncitizen aliens convicted of committing a crime to incarceration. Accordingly, the Department of Justice (DOJ) estimates that the INS average daily detention population more than tripled from 5,532 to 19,533 between Fiscal Year (FY) 1994 and FY 2001.<sup>7</sup> In FY 2000 alone, INS detained more than 188,000.

On top of these increases, the government's actions since September 11 has resulted in the detention of additional noncitizen aliens, as government officials search for possible co-conspirators to the terrorist acts. According to figures published by the DOJ, the INS detained approximately 1,200 individuals shortly after September 2001.<sup>8</sup> Civil liberty organizations, however, dispute these figures, and believe that INS may have instead detained up to as many as 2,000 individuals.<sup>9</sup> Regardless of the actual num-

ber of individuals detained as a result of September 11, any increase in the number of detainees has placed a strain on an already overtaxed federal detention system.

### **An Overview of INS Detention Practices**

Typically, when an alien is apprehended by a border patrol agent at or near one of our borders, that alien is then transported to a border patrol station where the border patrol decides whether to proceed with an administrative or criminal proceeding against the alien. It is at this point that the detention process begins, as the border patrol determines whether the alien poses a flight risk or risk of danger to the community or is required to be detained pursuant to the law. The INS detention policy establishes four categories of aliens and characterizes them by the priority level of their detention.

The first category of aliens includes those subject to mandatory detention. These aliens include those individuals being detained during immigration proceedings and those who have already been issued removal orders and are waiting to be removed. For both categories of aliens, the Immigration and Nationality Act, 8 U.S.C. §§ 1-14 (INA) requires mandatory detention. For example, Section 235 of the INA requires arriving aliens who have been placed in expedited removal proceedings be placed in mandatory detention, and Section 236(c) requires those aliens which are chargeable as terrorists—as well as all criminal aliens—to also be placed in mandatory detention. Further, the INA also requires aliens who are subject to final orders of removal as criminals or terrorists to also be detained so that the government can execute their removal from the country.

The second category of aliens includes those for whom the law does not mandate detention, but still places a high priority on detention—including those who are deemed to be a danger to the community or a flight risk, as well as those who smuggle aliens into the country. The government will consider the severity of any crimes for which the alien has been convicted, whether the alien failed to appear for court, the alien's ties to the community, and the alien's prior history of violating U.S. immigration law.

If there is no legal requirement for mandatory detention and no significant risk of flight or danger to the community, an alien may be released on his or her own recognizance, bonded out,<sup>10</sup> or paroled into the community. These individuals make up the third category of aliens, and include inadmissible noncriminal aliens, i.e., those who are not placed in expedited removal status, as well as aliens who were smuggled into the country or apprehended at work sites. The government lists this third category of aliens as medium priority for detention purposes. The last category of aliens includes noncriminal aliens apprehended at the border and those who have not been referred for expedited removal. This fourth category of aliens receives a lower priority for detention purposes.

Once a final order of removal is issued for an alien, the INS is also authorized—under Section 241(a) of the INA—to detain that alien during that 90-day removal period. Of course, if the alien is a criminal or terrorist, the deten-

tion is mandatory. Further, if the alien is not removed after the conclusion of the 90-day removal period, the INS has the authority to continue detaining the alien for a period of up to six months.<sup>11</sup> If the alien is to be detained beyond the six-month period, the INS must release the alien if the government cannot rebut a showing by the alien that there is good reason to believe that there is no significant likeli-

rections Corporation of America, Wackenhut Corrections Corporation, Cornell Corrections, Inc., and Correctional Services Corporation. In most cases, the INS contracts with these companies for a three-year base period, with the ability to exercise one-year options for an additional five years.

Finally, the INS also contracts with state and local jails on a reimbursable detention day basis. More specifically,

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*While IGAs are not subject to federal procurement statutes, they are governed by special rules concerning proper parties, mandatory substantive provisions, appropriate processes of execution and approval, and other matters of form.*

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hood of removal in the reasonably foreseeable future.<sup>12</sup> In the event that the alien is a terrorist or an especially dangerous individual, the INS is permitted to detain that individual despite the fact that the six-month period has elapsed and removal of the individual is unlikely in the reasonably foreseeable future.<sup>13</sup>

### **Sources of INS Detention Space**

To effectuate the detention policies of the INA, the INS relies upon four sources for detention space: (1) INS-owned Service Processing Centers, (2) facilities jointly operated by INS and the Bureau of Prisons (BOP), (3) contracts with private vendors, and (4) state and local jails.<sup>14</sup> According to DOJ statistics, in 1994, 43 percent of detainees were housed in facilities owned and operated by the government, while 50 percent were housed in state and local facilities, and only 6 percent were housed in private facilities. By 2001, however, only 29 percent of detainees were housed in federal facilities, while 58 percent were housed in state and local facilities and 13 percent were housed in private facilities.<sup>15</sup>

With regard to the INS Service Processing Centers (SPCs), these facilities are both owned and operated by the INS. Currently, the INS has SPCs in Aguadilla (Puerto Rico), Batavia (New York), El Centro (California), El Paso (Texas), Florence (Arizona), Miami, Los Fresnos (Texas), San Pedro (California), and New York City (New York). The INS also has an SPC in Buffalo, New York, which it shares with the U.S. Marshals Service, which utilizes 150 of the 450 beds in the facility.<sup>16</sup>

Currently, the only facility jointly operated by the INS and the BOP is the Federal Detention Center (FDC) in Oakdale, Louisiana. This facility is most known for the 1987 uprising which occurred there, in which Mariel Cuban detainees staged an eight-day rebellion after learning that they were being sent back to Cuba. Today, FDC Oakdale houses approximately 1,169 male detainees<sup>17</sup> awaiting adjudication at the Oakdale Immigration Court or deportation.

In addition, INS currently has seven contract detention facilities. These facilities are located in Denver, Houston, Laredo, Seattle, Elizabeth (New Jersey), Queens (New York), and San Diego, and operated (and in some cases owned) by private correction providers, such as Cor-

rections Corporation of America, Wackenhut Corrections Corporation, Cornell Corrections, Inc., and Correctional Services Corporation. In most cases, the INS contracts with these companies for a three-year base period, with the ability to exercise one-year options for an additional five years.

### **A Material Weakness in INS Detention Resources**

Despite what appears to be ample sources of detention space, the INS continues to face a shortage of necessary bed space. Dating back to September 1989, officials within the DOJ began noticing a "material weakness" in the government's detention space and infrastructure.<sup>18</sup> More specifically, detention space had become a management challenge as both the INS and the US Marshals Service (USMS) competed for the existing, but limited, detention resources.

While the INS faced mandatory detention requirements under the IIRIRA, the USMS began experiencing a shortage in detention space near federal court cities, which was forcing the agency to transport prisoners to facilities located in other, distant states.<sup>19</sup> As a result of these dramatic increases in the number of INS and USMS detainees, the DOJ Inspector General (DOJ IG) listed detention space and infrastructure as one of DOJ's top management challenges during Fiscal Year 2001.<sup>20</sup> In particular, the DOJ IG noted that obtaining and efficiently managing detention space for the USMS and the INS remains a top management challenge. Further, the DOJ IG noted that in light of the government's response to the September 11 attacks, the INS may need additional detention space.<sup>21</sup>

### **Criticism of DOJ Detention Procurement Policies**

Part of the criticism of DOJ's management of detention space related to the government's procurement of detention space from state and local jails, as well as private contractors. As discussed above, the INS regularly procures bed space from state and local jails through the use of IGAs. However, between 2000 and 2001, the DOJ IG conducted numerous audits of INS IGAs and discovered that the government was often being overcharged by the state/local provider. For example, the DOJ IG reviewed

the IGA with a county government and discovered that INS was overcharged a total of \$6.1 million.<sup>22</sup> The DOJ IG also audited an IGA with the Government of Guam, finding that between 1998 and 2000, the INS overpaid Guam more than \$3.6 million.<sup>23</sup> The DOJ IG concluded that INS had not yet settled on a procurement process to obtain detention space in a manner that meets prudent business practices and existing procurement regulations.<sup>24</sup>

However, the DOJ IG's criticism was not limited to INS use of IGAs. The DOJ IG was also very critical of the government's use of private contracts to obtain detention space. In particular, in a 2001 investigation of private detention services, the DOJ IG expressed concern over the government's practice of relying on only a few private contractors.<sup>25</sup> The DOJ IG noted that the BOP, the USMS, and the INS had not developed a coordinated contingency plan to address the loss of bed space if a private provider was unable to continue operations on a large scale. The DOJ IG concluded that without coordinated contingency planning, the disruption of contract detention services could lead to a host of legal, health, financial, logistical, safety, and security issues.

#### **Authority to Enter into More Flexible Detention Agreements**

Many of the problems addressed by the DOJ IG are the direct result of limitations placed on the government when it acquires services from state, local, or private detention providers. For example, federal procurement law imposes

term limitations on standard service contracts, including service contracts with private detention providers. These limitations result in a disconnect between the services being provided (construction and operation of a detention facility) and the debt financing necessary to perform that contract.

Private detention financiers who provide the capital used to construct the facility want the private detention contractor to amortize its costs over the base period. However, the base period of a standard service contract cannot extend beyond five years.<sup>26</sup> Accordingly, the cost to finance a private detention facility is often too high or financing is not available at all.

Furthermore, although the INS can enter into an IGA (which is outside the scope of federal procurement law) for detention services, there are limitations regarding parties to an IGA. More specifically, possible parties to a DOJ IGA only included agencies and departments of state governments, as well as other territorial agencies and departments of the U.S. Government.<sup>27</sup> The INS cannot enter into an IGA with a private detention provider.<sup>28</sup>

To remedy this problem and provide greater flexibility to the government when acquiring detention services, Congress included the following language in the 2001 DOJ Appropriations Act:

SEC. 119. Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 (41 U.S.C. 353(d)), the Attorney General

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hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.

Shortly after the passage of this language, the Attorney General delegated this authority to the INS Commissioner, authorizing the INS to now enter into innovative detention contracts with terms that are more flexible than standard service contracts. In particular, the phrase “notwithstanding any other provision of law,” unequivocally gives the INS discretion to purchase detention services outside the confines of traditional procurement regulations.<sup>29</sup> Arguably, the only limitation on detention contracts between the INS and state, local, or private providers is that the agreements must be for a reasonable duration and on a reasonable basis.

### Acquiring Detention Space for Homeland Security

This brings us back to homeland security and DHS’s ability to acquire detention space for homeland security. Initially, the House version of the Homeland Security Act of 2002, as proposed, would have allowed DHS flexible procurement policies to carry out its mission. More specifically, the legislation would have exempted DHS from complying with the Federal Property and Administrative Services Act, the Competition In Contracting Act, and possibly even the Federal Acquisition Regulation.<sup>30</sup> This language would have allowed the DHS flexibility when procuring detention services. However, in the final passage of the bill creating DHS, the House of Representatives dropped the provision allowing DHS procurement flexibility. Accordingly, the new DHS will need to rely on the transfer of the authority under Section 119 (discussed above) which was initially given to the Attorney General (and later delegated to the INS) for flexibility in procuring detention services. Typically, when oversight of an agency is shifted from one cabinet department to another, the agency continues to operate under previous delegations until the new supervising department promulgates new regulations or such authority is otherwise statutorily revoked.<sup>31</sup> For example, when the United States Coast Guard was transferred from the Department of Commerce (DOC) to the Department of Transportation (DOT), the Coast Guard functioned under the authority delegated to it by DOC until the DOT either revoked or expanded that authority. Absent congressional action, the new DHS Secretary will have discretion whether to continue to grant INS with the authority of Section 119 or revoke it.<sup>32</sup>

### Possible Applications of DHS Authority to Procure Detention Services

Assuming the DHS Secretary will authorize INS flexibility to procure detention service contracts, the new DHS could enter into a contract with a private detention company which allows for an extend performance period.<sup>33</sup> Under this scenario, the DHS would enter into a long-term agreement, for perhaps 20 years, with a contractor who



would design, build, own, and operate the facility. Under this scenario, the DHS could even make it a condition of the procurement that at the end of the contract—or if the government terminates the contract early—the government would either lease or acquire the facility at fair market value. Under this option, the contractor could obtain capital (to build the facility) at more favorable rates, while the DHS could reduce any risk associated with the possibility that the provider might go bankrupt.

Another option for the DHS would be to bifurcate the private detention procurement process—with one contractor designing, building, and owning the facility and another contractor operating and managing the facility. The advantage for the DHS under this bifurcated process is that it separates control of the facility from the operation of the facility. In other words, since one contractor would own the facility and one contractor would operate the facility, it is unlikely that the government would face a situation where both contractors experienced complete financial failure. For the operating contractor, this process offers a straight service contract without the added costs of financing the construction of the facility. For the design/build/own contractor, the advantages are that the government finances the construction of the facility—although the owning contractor may have concerns regarding the maintenance of the facility.<sup>34</sup>

Finally, still another option for the DHS would be to enter into a consortium or multiparty agreement with a state/local department of corrections and a private corrections provider. As noted above, the INS has been limited to entering into IGAs with local governments to carry out functions or services on behalf of the federal government. However, a private corrections provider could be a party to a multiple or consortium agreement with the DOJ under a Section 119 agreement.

### Conclusion

In discussing the nation’s homeland security efforts, Angela Styles of the White House Office of Federal Procurement Policy has said: “If there has ever been a time when the government needs to expand and fortify its base of suppliers for both goods and services, this is the time.”<sup>35</sup> Nowhere is this more evident than in the procurement of detention space—a problem which has plagued the INS since 1989. However, with authority to procure detention services outside traditional procurement regulations, the new Department of Homeland Security will have a weapon in its arsenal to combat terrorism here at home.”

### Endnotes

1. See George W. Bush, President Increases Immigration Safeguards (October 2001). This document can be found at: <http://www.whitehouse.gov/deptofhomeland>.
2. See Remarks by the President in Address to the Nation, June 6, 2002. This document can be found at: <http://www.whitehouse.gov/deptofhomeland>.

3. See Homeland Security Act of 2002, Immigration and Nationality Functions, Immigration Enforcement, H.R. 5005, Title IV, Subtitle B, Chapter 1 (2002). This document can be found at: <http://thomas.loc.gov>.
4. See National Homeland Security and Combatting Terrorism Act of 2002, S. 2452, Title I, Section 102 (2002). This document can be found at: <http://thomas.loc.gov>.
5. See FY 2000 Summary Performance Plan, Department of Justice, Justice Management Division, March 1999.
6. See Pub. L. No. 104-207, 110 Stat. 3009 (Oct. 1, 1996).
7. See Joseph Greene, Acting Deputy Executive Associate Commissioner for Field Operations and Edward McElroy, District Director, New York, U.S. Immigration and Naturalization Service Before the House Committee on the Judiciary Subcommittee on Immigration and Claims Regarding A Review of the Department of Justice Immigration Detention Policies, December 19, 2001.
8. See Profile: Justice Department continues detainee investigations, National Public Radio: Morning Edition, Tuesday, December 25, 2001.
9. See "Courts Wrestle With Keeping Detainees Secret," *ABA Journal*, September 2002, at 46.
10. See INA section 236(a) for general bond authority.
11. Under *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), the U.S. Supreme Court held that detention of such aliens beyond the six-month period is permissible, provided that the alien cannot demonstrate that there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. Of course, if the government has reason to believe that the alien is a terrorist or especially dangerous, the government can continue detention of the individual despite the fact that removal is unlikely in the reasonably foreseeable future.
12. See *Zadvydas v. Davis*, supra at 2504-2505.
13. See *Id.* at 2505. The holding of the Supreme Court in *Zadvydas v. Davis* was recently codified in regulations promulgated by the INS. See 66 FR 56967, November 14, 2001.
14. See Immigration and Naturalization Service Contracting for Detention Space Audit Report 97-05 (1/97).
15. See Statistics on the Web site of the Federal Detention Trustee at <http://www.usdoj.gov/ofdt/statistics.htm>.
16. See <http://www.ins.usdoj.gov/text/fieldoffices/detention/INSDetention.htm>
17. See 2000 *Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities Directory*, American Correctional Association (2000), at 679.
18. See Department of Justice Accountability Report for Fiscal Year 2001, Federal Managers Financial Integrity Act Corrective Action Reports for Fiscal Year 2001, at G-5.
19. *Id.*
20. See Memorandum for the Attorney General, the Deputy Attorney General; From: Glenn A. Fine, Inspector General; Subject: Top Management Challenges in the Department of Justice—2001 List; December 31, 2001.
21. It's important to note that the DOJ FY 2001 Budget request established the Office of the Federal Detention Trustee (OFDT) to help resolve the management challenges faced by DOJ with regard to detention space and infrastructure. Pursuant to the Budget Request, the new Detention Trustee reports directly to the Deputy Attorney General and is responsible for managing Justice Department detention resources. However, both the FY 2001 and FY 2002 Budget Requests did not aim to provide the new Detention Trustee with control over DOJ detention funds. As a result, Congress directed the DOJ to either provide a funding proposal in FY 2003 which fully centralizes all detention funding under OFDT or eliminate the office. More recently, the Senate Report accompanying the DOJ's FY 2003 Appropriations Act recommends that not later than 45 days after enactment of the FY 2003 Appropriations Act, DOJ is directed to transfer such personnel from the USMS, INS, and BOP to the Detention Trustee to give him full operational control of bed space management.
22. See DOJ IG Report # GR-70-01-005.
23. See DOJ IG Report # GR-90-01-006.
24. See Memorandum for the Attorney General, supra at Note 21, at page 10.
25. See Department of Justice's Reliance on Private Contractors for Prison Services, Report No. 01-16, July 2001.
26. See 41 U.S.C. 353(d).
27. See 18 U.S.C. 4002.
28. See Immigration and Naturalization Service Contracting for Detention Space Audit Report 97-05 (1/97).
29. See *Matter of: RJO Enterprises, Inc.*; June 9, 1993; B-252, 232, 93-1 CPD & 446; *TLM Marine, Inc.*, B-226,968, 87-2 CPD & 111 (1987).
30. In early drafts of HR 5005, the House included DHS on a list of twenty-one agencies that are "exempted" from the FPASA pursuant to 40 USC '474(d). See H.R. 5005 '732(c). Such exemption would have had the effect of completely exempting DHS from compliance with not only the FPASA, but also CICA.
31. See *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997).
32. See *U.S. v. Mango*, 199 F.3d 85 (2nd Cir. 1999); *National Ass'n of Mfrs. v. United States DOI*, 134 F.3d 1095 (D.C. Cir. 1998); *NRA of Am., Inc. v. Reno*, 216 F.3d 122 (D.C. Cir. 2000); See also *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000).
33. This option was actually explored by the BOP in March 2001 with regard to Request For Proposal (ARFP@) PCC-0007. More specifically, the government told prospective offerors that it was exploring the possibility of using different contract terms allowed under the 2001 appropriations language. The BOP asked offerors to propose alternative pricing options based on models with varying base periods and option years, including a base period of seven years and an option period of 15 years. In the end, the BOP canceled the RFP due to a change in the government's need for detention space. Accordingly, we do not know whether the BOP would have awarded a contract with a longer base period or longer option periods and how that would have affected the offerors' prices.
34. A better option is for the design/build/own contractor company to build the facility and then lease it back to the DHS. Under the lease back alternative, the DHS would then have complete control over the facility.
35. See Security spending affords opportunities for businesses Tech firms vying for the attention of federal agencies, *The San Diego Union-Tribune*, December 10, 2001.

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